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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF WILLCOX, ARIZONA, and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF IN REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. AND THE CITY OF WILLCOX, ARIZONA

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One of the primary bases for review by this Court is a decision involving "an important question of federal law which has not been, but should be, settled by" the Supreme Court. (Rule 17.1(c) of the Rules of the Supreme Court). The City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc. (jointly AEPCO) asserted that the Federal Energy Regulatory Commission's (FERC) "open access" rule involves such a question, the court below in its opinion conceded the importance of this case to the natural gas industry (J.A. 17a), and in Order 436 FERC admitted that "open access" is the "cornerstone" of Order 436. (J.A. 122a). While the respondents all argue that the decision was correct, no respondent contends that the questions presented here are not "important questions of federal law". Consequently, review should be granted.

I. AEPCO'S PETITION FOR CERTIORARI IS NEITHER PREMATURE NOR MOOT

Respondent, Process Gas Consumers Group, *et al.* (PGC), argues (Br. pp. 5-9) that AEPCO's petition for certiorari is either moot or premature. It claims that since the Court below vacated Order 436, the challenge to Order 436 is moot. It also claims that since Order 500, FERC's interim rule which replaces Order 436, is not final, a challenge to it is premature. While this argument has a certain appeal, it misunderstands this Court's function, is contrary to precedent and exalts form over substance.[1]

AEPCO has challenged Order 436 on the basis that FERC's "open access" rule is *ultra vires* because it requires all pipelines providing transportation under Section 311 of the Natural Gas Policy Act (NGPA), 15 U.S.C. §3371, or Section 7 of the Natural Gas Act (NGA), 15 U.S.C. §717f, to operate as common carriers. PGC argues that in its interim rule FERC has made significant changes

[1] It is worth noting that FERC, the party best situated to make this argument, has eschewed it and has joined issue on the merits.

in Order 436 as originally promulgated and that more changes in the "open access" rule are on the way. "Open access" is the heart and soul of Order 436 and except for one class of shippers—gas producers—no change is contemplated. In Order 500, FERC expressly stated:

> The Commission does not seek comment on those provisions of Order No. 436 which were upheld by the Court and are being repromulgated here without change.

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, III FERC Stats. & Regs. ¶30,761, p. 30,799; 52 Fed. Reg. 30,334 at 30,350 (August 14, 1987).

Thus, it is crystal clear that not only did the Court below uphold the "open access" policy, but also that FERC has no intention of changing it. Therefore, regardless of whether Order 436 is technically still in existence, the "open access" rule promulgated in Order 436 is still in daily operation and will remain so irrespective of FERC's ultimate resolution of the other issues raised in Order 500.

Put simply, the primary function of this Court is to ultimately determine important questions of Federal law. The controlling consideration is the importance of the issue and whether it is ripe for decision. Here, the Court below upheld the "open access" rule and FERC has stated that it will not revisit the issue. It is now ripe for decision.

In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court faced a similar situation. In that case, the FPC (FERC's predecessor) prescribed area rates for gas producers in the Permian Basin. The court of appeals upheld the procedures used by the FPC but reversed and remanded because certain aspects of the FPC's decision were unsupported by evidence. This Court granted the producers' petitions for certiorari even though the decision was not final as to all issues because the "proceedings

began a new era in the regulation of natural gas producers . . .". *Id.* at 755. The same principle applies here.[2]

II. OPEN ACCESS IS COMMON CARRIAGE

The Court below implicitly accepted the proposition that "open access" is equivalent to common carriage.[3] The respondents[4] who claim that open access does not constitute common carriage misstate the law. In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), the court stated ". . . that to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve . . .". In *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979), this Court adopted this definition.[5]

III. ORDER 436 IMPOSES COMMON CARRIAGE IN VIOLATION OF THE NGPA

A. Respondents contend that Section 602(b) of the NGPA, 15 U.S.C. §3432(b), poses no barrier to FERC's

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[2] In *Permian*, this Court reviewed all of the issues including those on which the FPC was reversed. Here we are asking the Court to consider only the "open access" issue. A decision on "open access" favorable to AEPCO will moot almost all other aspects of Order 436.

[3] The court below did not reject petitioners' argument that the "open access" condition is the equivalent of common carriage. It simply found this fact irrelevant in the face of FERC's authority to eliminate discrimination. (J.A. 26a-27a).

[4] PGC Br. pp. 16-20; Producers Br. p. 2; Exxon Br. p. 10; Maryland People's Counsel (MPC) Br. p. 12.

[5] PGC argues that open access is not common carriage because the specifics of Order 436 are in some respects different from other forms of common carraige. These differences are peripheral to the essence of common carraige which is a duty to serve indiscriminately.

imposition of an "open access" condition on transporters of gas under Section 311 of the NGPA.[6] Although the provision on its face appears to do just that, they argue that Congress did not intend to prevent FERC from eliminating discrimination by imposing a remedy which has the attributes of common carriage. According to respondents, Congress must have intended something else.

Respondents contend that Section 602(b) was intended to protect pipelines from regulation as common carriers under *state* and possibly *other* federal laws.[7] The plain meaning of the section, however, prohibits any person from being regulated as a common carrier under *Federal* or State law by reason of any transportation authorized by FERC under Section 311(a) of the NGPA. If Congress had intended to exempt FERC from this proscription, it could have easily done so by eliminating the reference to *Federal* law or using the phrase "*other* Federal" law.

B. The rationale of the court below in support of the Commission's imposition of non-discriminatory transportation under the NGPA is internally inconsistent with its rationale in support of the Commission's action under the NGA. The court below reasoned in the context of the NGA that the failure of Congress to grant the Commission a "general" power to impose common carriage cannot prevail over the more "specific" grant of power to eliminate

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[6] FERC Br. pp. 21-22; PGC Br. pp. 20-24; MPC Br. pp. 15-17; Producers Br. pp. 12-14; Exxon Br. pp. 14-15.

[7] FERC Br. pp. 22-23; PGC Br. pp. 21-23; MPC Br. pp. 16-17. PGC and MPC rely on the title of Section 602—"Effect on State Law"—for their conclusion that the section was primarily directed at state law. This interpretation reads the word "Federal" right out of the statute. It is a maxim of statutory construction that the heading of a section cannot limit the plain meaning of its text. *Brotherhood of Railroad Trainmen v. B&O Railroad Co.*, 331 U.S. 519, 528-529 (1947).

discrimination. (J.A. at 27a; FERC Br. pp. 19-20).[8] When applied to the NGPA, which contains an express prohibition on the imposition of common carrier obligations but no mention of undue discrimination, this rule of statutory construction demonstrates the lack of Commission authority to impose common carriage under the NGPA.

Contrary to the contentions of MPC and Exxon,[9] there is no express provision in the NGPA similar to Sections 4 and 5 of the NGA, 15 U.S.C. §§717c and 717d, which confers authority upon FERC to eliminate undue preferences or undue discrimination. The only authority cited by FERC for its imposition of "open access" on NGPA transportation is its general authority to prescribe "terms and conditions" under Section 311(c), 15 U.S.C. §3371(c). This general conditioning authority cannot prevail over the express prohibition in Section 602(b) against regulating pipelines as common carriers. *See Panhandle Eastern Pipe Line Co.*, 15 F.P.C. 46, 58 (1956), *aff'd sub nom. Central West Utility Co. v. FPC*, 247 F.2d 306 (3d Cir. 1957).

FERC justifies its open access requirement as a remedy for anticompetitive and discriminatory practices. Perhaps, in recognition of the absence of any mention of discrimination in the NPGA, the Commission relies on the overall purpose of the NGPA to promote competition. Both the Producers and FERC rely on *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986), for the proposition that the NGPA was designed to "give market forces a more significant role in determining the supply, the demand and the price of natural gas."[10]

This Court in *Transcontinental* found that Congress intended in the NGPA to deregulate *first sales* of gas in

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[8] AEPCO does not agree that a conferred power to eliminate discrimination is more specific than a withheld power to impose common carriage.

[9] MPC Br. pp. 9-10; Exxon Br. pp. 12-14.

[10] FERC Br. pp. 3-4, Producers Br. p. 8.

order to let the wellhead price of such gas be determined by market forces. *Transcontinental*, 474 U.S. at 422. However, Congressional intent that market forces play a greater role in setting the *wellhead* price of gas does not indicate that Congress also intended FERC to have unlimited authority to promote competition at the point of delivery to the consumer.

Congress also sought to facilitate the movement of the gas to market by removing existing regulatory barriers to the transportation of gas between the interstate and intrastate markets.[11] Thus, it intended in Section 311(a) that FERC authorize pipelines to transport gas in interstate commerce free from the burden of NGA regulation. Had Congress intended FERC to ensure competition at the consumer end of the pipeline, it could have expressly granted FERC the authority to compel transportation for all who desired it. Instead, it did just the opposite by prohibiting the imposition of common carriage in Section 602(b).

Even if the elimination of discrimination was an unstated objective of the NGPA, the open access requirement cannot stand in the face of the express prohibition of common carriage found in Section 602(b). In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Supreme Court rejected an attempt by the Federal Communications Commission to require broadcasters to provide open access on their channels in the face of a similar common carriage prohibition found in the Communications Act of 1934, 47 U.S.C. §151, 153(h). This Court rejected the FCC's contention that it was irrelevant whether its regulations imposed common carrier obligations so long as its regulations promoted statutory objectives.

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[11] *See Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530, 535 (1981), *aff'd sub nom. Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 331 (1983).

Respondents' attempts to confine *Midwest Video* to the communications industry miss the point.[12] Just as Congress intended cable operators to have control over programming on their channels; Congress has, since the beginning of natural gas regulation, intended pipelines to have control over whom they serve. No administrative agency can promulgate rules which violate an express prohibition in its enabling Act.

IV. ORDER 436 IMPOSES COMMON CARRIAGE IN VIOLATION OF THE NGA

A. FERC asserts that petitioners "do not dispute either the existence of the practices the Commission found or the Commission's finding that they are unduly discriminatory."[13] We do not concede that a refusal to serve is *unduly* discriminatory when the statute by its terms allows the pipeline to pick and choose its customers.

B. AEPCO argued that the decision below conflicts with the Third Circuit's decision in *Central West Utility Co. v. FPC*, 247 F.2d 306 (3d Cir. 1957). FERC attempts to distinguish *Central West* by confining its holding to a prohibition against conditioning certificates on the expansion of facilities, an action that the Commission is prohibited from directly compelling under Section 7(a) of the NGA.

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[12] Producers Br. p. 7; Exxon Br. p. 9; PGC Br. p. 25. Notably, FERC does not take this tack. Rather, it argues (Br. p. 24) that *Midwest Video* is inapplicable because 1) there is no common carrier prohibition in the NGA or NPGA and 2) the question of whether a rule imposing open access may be justified as a remedy for unduly discriminatory and anticompetitive practices was not present in that case. These arguments cannot be sustained. First, Section 602(b) of the NGPA is precisely the type of common carrier prohibition found in the Communications Act. Second, the FCC presumably would not have needed to impose its access rules had broadcasters been voluntarily providing open access.

[13] FERC Br. p. 17. See also PGC Br. p. 9 and Exxon Br. p. 9.

(FERC Br. pp. 25-26, n.17). *Central West*, however, stands for the broader proposition that the Commission cannot utilize its conditioning authority to expand its statutory authority by exercising powers withheld by Congress. In *Central West*, the unauthorized action was the Commission's compulsion of an enlargement of facilities, while in Order 436 the unauthorized action is the imposition of common carriage.

The imposition of common carriage is even more egregious because unlike sales service, which FERC has the authority to compel in appropriate circumstances under Section 7(a), the statute provides no authority whatsoever for the Commission to compel transportation.

C. The court below acknowledged that this Court in *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 374 (1973), held that Congress in enacting the Federal Power Act, 16 U.S.C. §824, *et seq.*, considered and rejected a provision which would have made electric utilities common carriers and that therefore FERC lacks the power to compel electric utilities to act as common carriers.[14] The court below concluded that the history of the NGA is less convincing because it consists exclusively of rejected legislative proposals which would have made pipelines into common carriers. (J.A. 28a).

FERC's argument on the legislative history of the Power and Gas Acts (Br. pp. 19-22, 24-25) merely restates the reasoning of the court below. It suffers from the same flaws which AEPCO exposed in detail in its petition (pp. 17-20).

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[14] *See also Florida Power & Light v. FERC*, 660 F.2d 668 (5th Cir. 1981); *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978).

Furthermore, Section 206 of the Power Act and Section 5 of the NGA are in *pari materia*.[15] FERC has not explained how, if these two provisions have identical meanings, one can serve as a basis for open access and one cannot. We submit that both cannot.

V. ORDER 436 IS NOT VOLUNTARY

Respondents contend that Order 436 does not impose common carriage because it is a voluntary program.[16] The court below rejected FERC's voluntariness theory finding that the choice offered by the Commission was similar to a choice given to a condemned man "between the noose and the firing squad". (J.A. 81a). FERC attempts to evade this fact by restricting the court's rejection to the issue under consideration.[17] The court below, however, rejected the voluntariness theory because the choice given to pipelines not to accept Order 436 was not a viable alternative in light of economic realities. This is true regardless of the issue under consideration by the court below.

Moreover, FERC's open access condition violates the NGPA even if the Order 436 program was truly voluntary. Section 602(b) of the NPGA prohibits not only a direct imposition of common carrier status on pipelines, but also regulation of pipelines as common carriers "by reason of" transportation performed under Section 311(a) of the Act. Thus, FERC lacks authority to impose "open access" as

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[15] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 350 (1956).

[16] FERC Br. p. 21 n.12; PGC Br. p. 17, MPC Br. pp. 13-14; Producers Br. pp. 9-11; Exxon Br. p. 10.

[17] FERC argues that the court's reasons for rejecting its voluntariness theory as a justification for refusing to adequately address pipelines' take-or-pay liabilities "have nothing to do with the common carriage arguments." FERC Br. p. 21 n.12; see also Exxon Br. p. 10 n.10.

a condition to a pipeline's voluntary choice to transport under Section 311(a).[18]

CONCLUSION

For the foregoing reasons and those presented in our petition, it is respectfully submitted that AEPCO's petition for certiorari should be granted.

Respectfully submitted,

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[18] Respondents also argue (Producers Br. p. 10; Exxon Br. p. 10; PGC Br. pp. 15-16) that Order 436 does not impose common carriage because pipelines remain free to apply for individual Section 7(c) certificates to provide transportation to one or more named customers. The fact is though that FERC has uniformly refused to grant such applications unless the pipeline agrees to provide the same service to all customers who desire it. *See, e.g., ANR Pipeline Co.*, 41 FERC ¶ 61,043 (1987). Thus, in practice pipelines are now forced to either operate as common carriers or to not transport customer owned gas. This is a choice which FERC cannot constitutionally force a pipeline to make. *Frost v. Railroad Commission*, 271 U.S. 583 (1926).